MOTION FILED
DEC 30 2002

(3)

No. 02-829

IN THE

Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Fourth Appellate District

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN J. GILL
General Counsel
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

ALAN S. KAPLINSKY *
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Counsel for *Amici Curiae*

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), the Consumer Bankers Association ("CBA") and the Chamber of Commerce of the United States (the "Chamber") respectfully move this Court for leave to file the accompanying Brief as *amici curiae* in support of the position of Petitioner Discover Bank ("Discover") in this case. The written consent of Discover has been filed with the Clerk of Court. Counsel for Respondent John Szetela has not consented.

The proposed *amici* have a substantial interest in the outcome of this case.

The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The AFSA was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently

owned consumer finance offices to the nation's largest financial services, retail and automobile companies. The AFSA's membership includes national and state banks that operate multi-state consumer credit programs.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The Chamber is the world's largest business federation representing an underlying membership of more that 3,000,000 businesses of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch.

The ABA, the AFSA, the CBA and the Chamber frequently appear in litigation as *amicus curiae* where the issues raised are of widespread importance and concern to banks, consumers of banking services or the nation's business community. *See, e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) (the ABA and the CBA as *amici*); *Textron Funding Corp. v. Bessette*, 532 U.S. 1048 (2001) (the AFSA as *amicus*); *Vermont Agency of Natural Resources v. United States*, 528 U.S. 1044 (1999) (the Chamber as *amicus*). Many ABA, AFSA, CBA and Chamber members regularly include arbitration agreements in their consumer loan documents and deposit and business contracts.

Many of those agreements expressly state that class-wide arbitration is not permitted.

The *Szetela* opinion raises issues of exceptional importance to banks, consumer financial services companies, credit card issuers and other businesses throughout the nation which have entered or are planning to enter into arbitration agreements governed by the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* ("FAA"). Many of the arbitration agreements used by *amici* include express "no-class action" provisions—similar to Discover's—because arbitration is designed to be simpler, faster and cheaper than court proceedings. Agreeing to waive complex litigation procedures, such as class actions, obviously effectuates these admirable goals of arbitration.

Amici have relied on the decisions of numerous federal courts of appeals, federal district courts and state supreme courts applying the FAA which have enforced no-class action provisions in arbitration agreements and found them to be not unconscionable. Discover's arbitration agreement is governed by the FAA. Nevertheless, the *Szetela* court ignored the FAA and struck the no-class action provision as unconscionable on the grounds that it discourages individuals with small claims from enforcing their rights and causes "litigants to contract away the court's ability to use a procedural mechanism [the class action] that benefits the court system as a whole." 118 Cal. Rptr. 2d at 868.

The *Szetela* court's reasoning cannot be reconciled with this Court's declarations that "the FAA is 'at bottom a policy *guaranteeing* the enforcement of private contractual arrangements'" and that "we look first to whether the parties *agreed* to arbitrate a dispute, *not to general policy goals*, to determine the scope of the agreement . . . ." *EEOC v. Waffle House, Inc.* 122 S. Ct. 754, 764 (2002) (emphasis added). In particular, the *Szetela* opinion impermissibly forces companies to choose between forced class arbitration or no

arbitration at all and improperly relegates individual arbitration to second-class status.

By flouting the FAA's "guarantee," the *Szetela* opinion generates substantial confusion and disrupts the settled expectations of *amici* that arbitration agreements will be enforced strictly in accordance with their terms. The opinion will both discourage companies from arbitrating, while encouraging hostility to arbitration of the type that the FAA was enacted to overcome.

WHEREFORE, the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association and the Chamber of Commerce of the United States respectfully request that the Court grant them leave to file the accompanying Brief *amici curiae*.

Respectfully submitted,

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN J. GILL
General Counsel
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

ALAN S. KAPLINSKY *
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street,
51st Floor
Philadelphia, PA 19103
(215) 665-8500

Counsel for *Amici Curiae*

* Counsel of Record

QUESTION PRESENTED

Whether the California Court of Appeal properly ruled—in conflict with the Federal Arbitration Act, this Court's precedents, and the decisions of all the federal courts of appeal to have addressed the issue—that parties to an arbitration agreement can be forced to arbitrate as a class or not at all, when their arbitration agreement expressly forecloses the use of class arbitration.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE *SZETELA* OPINION UNDERMINES THE FAA'S GUARANTEE THAT ARBITRATION AGREEMENTS WILL BE ENFORCED STRICTLY IN ACCORDANCE WITH THEIR TERMS	4
A. Under the FAA, Arbitration Agreements that Contain No-Class Action Provisions Must Be Enforced as Written and Are Not Unconscionable	5
B. The Principle that No-Class Action Provisions Are Enforceable in Accordance with Their Terms Is Substantive Federal Arbitration Law that Preempts Inconsistent State Procedures	9
C. The *Szetela* Opinion Impermissibly Forces Companies to Choose between Class Arbitration or No Arbitration at All	9
II. THE *SZETELA* OPINION IMPROPERLY RELEGATES INDIVIDUAL ARBITRATION TO SECOND-CLASS STATUS	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page

ACORN v. Household International, Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) 4
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 12, 15
Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189 (S.D. Cal. 2001) 7
Bazzle, et al. v. Green Tree Finance Corp., 569 S.E.2d 349 (S.C. 2002) 10
Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097 (C.D. Cal. 2002) 6
Blue Cross of California v. Superior Court, 67 Cal. App. 4th 42 (Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999) 10
Caudle v. American Arbitration Association, 230 F.3d 920 (7th Cir. 2000) 8
Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995) 5, 6, 9, 11
Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001) 5, 15
Comb v. Paypal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2001) 4
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 4, 15
Deiulemar Compagnia de Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473 (4th Cir. 1999) 6
Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991) 11
Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 15
Dominium Austin Partners, LLC v. Emerson, 248 F.3d 720 (8th Cir. 2001) 6
EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002) 4, 5, 6

TABLE OF AUTHORITIES—Continued

Page

Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994) 7

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 12, 14

Gras v. *Associates First Cap. Corp.*, 2001 WL 1632292 (N.J. Super. Ct. App. Div. Dec. 20, 2001) 7

Gray v. Conseco, Inc., 2001 U.S. Dist. LEXIS 21696 (C.D. Cal. Sept. 6, 2001) 6

Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) 12, 15

Iowa Grain Co. v. Brown, 171 F.3d 504 (7th Cir. 1999) 6

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 6, 13

Keating v. Superior Court, 31 Cal. 3d 584 (1982), *rev'd on other grounds*, 465 U.S. 1 (1984) 10. 11

Lewis Tree Service, Inc. v. Lucent Technologies, Inc., No. 99 Civ. A. 0-10657, 2002 WL 31121087 (D. Mass. Sept. 26, 2002) 8

Lloyd v. MBNA America Bank, N.A., No. 01-1752 (3d Cir. Jan. 7, 2002) 7

Lomax v. Woodmen of the World Life Ins. Soc., No. CIV A. 1:01-CV-2134WBH, 2002 WL 31455600 (N.D. Ga. July 16, 2002) 8

Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071 (C.D. Cal. 2002) 8

Luna v. Household Finance Corp., No. C02-1635L, 2002 U.S. Dist. LEXIS 21761 (W.D. Wash. Nov. 4, 2002) 4

TABLE OF AUTHORITIES—Continued

	Page
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995)	4
Mattox v. Decision One Mortgage Co., No. Civ. A. 0-10657, 2002 WL 31121087 (D. Mass. Sept. 26, 2002)	8
McCarthy v. Providential Corp., No. C94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994), *appeal dismissed*, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998)	6
McIntyre v. Household Bank, 216 F. Supp. 2d 719 (N.D. Ill. Aug. 19, 2002)	8
Med Center Cars, Inc. v. Smith, 727 So. 2d 9 (Ala. 1998)	7
Moses H. Cone Mem. Hosp. v. Mecury Const. Corp., 460 U.S. 1 (1983)	15
Pick v. Discover Financial Services, Inc., No. 00-935-SLR, 2001 WL 1180278 (D. Del. Sept. 28, 2001)	7
Pyburn v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001)	7
Randolph v. Green Tree Financial Corp., 244 F.3d 814 (11th Cir. 2001)	6
Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001)	6
Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048 (N.D. Ga. 1986), *aff'd in part and rev'd in part on different grounds*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)	7
Shales v. Discover Card Services, Inc., No. 02-0080, 2002 WL 2022590 (E.D. La. Aug. 30, 2002)	8

TABLE OF AUTHORITIES—Continued

	Page
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	12
Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc., 212 F.3d 858 (4th Cir. 2000)	9
Snowden v. Checkpoint Check Cashing, Inc., 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 2002 U.S. LEXIS 9264 (Dec. 16, 2000)	7
Southland Corp. v. Keating, 465 U.S. 1 (1984)	9
Stein v. *Geonerco, Inc.*, 17 P.3d 1266, 1270 (Wash. Ct. App. 2001)	7
Thompson v. Illinois Title Loans, Inc., No. 99 C 3952, 2000 WL 45493 (N.D. Ill. Jan. 11, 2000)	7
Vigil v. Sears National Bank, 205 F. Supp. 2d 566 (E.D. La. 2002)	8
Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University, 489 U.S. 468 (1989)	4
Zawikowski v. Beneficial National Bank, No. 98 C 2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999)	7
STATUTES AND RULES	
Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*	*passim*
Fed. R. Civ. P. 23	9, 11
5 Del. Code §§ 2514 *et seq.*	13
5 Del. Code § 143	13
12 U.S.C. § 1818 (b)-(i)	13
OTHER AUTHORITIES	
H.R. Rep. No. 97-542 (1982)	5
Joint Hearings on S.1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924)	5

IN THE

Supreme Court of the United States

No. 02-829

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Fourth Appellate District

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This *amici curiae* brief[1] is submitted in support of the petitioner, Discover Bank ("Discover").

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members and their counsel. Petitioner Discover Bank is a member of the *amici curiae* directly or through its affiliates.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile companies. The AFSA's membership includes national and state banks that operate multi-state consumer credit programs.

The Consumer Bankers Association ("CBA") is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation representing an underlying membership of more that 3,000,000 businesses of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the

Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch.

The ABA, the AFSA, the CBA and the Chamber frequently appear in litigation as *amicus curiae* where the issues raised are of widespread importance and concern to banks, consumers of banking services or the nation's business community. Many ABA, AFSA, CBA and Chamber members regularly include arbitration agreements in their consumer loan documents and deposit and business contracts. Many of those agreements expressly state that class-wide arbitration is not permitted.

SUMMARY OF ARGUMENT

The *Szetela* opinion raises issues of exceptional importance to banks, consumer financial services companies, credit card issuers and other businesses throughout the nation which have entered or are planning to enter into arbitration agreements governed by the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* ("FAA"). Many of the arbitration agreements used by *amici* include express "no-class action" provisions—similar to Discover's—because arbitration is designed to be simpler, faster and cheaper than court proceedings. Agreeing to waive complex litigation procedures, such as class actions, obviously effectuates these admirable goals of arbitration.

Amici have relied on the decisions of numerous federal courts of appeals, federal district courts and state supreme courts applying the FAA which have enforced no-class action provisions in arbitration agreements and found them to be not unconscionable. Discover's arbitration agreement is governed by the FAA. Nevertheless, the *Szetela* court ignored the FAA and struck the no-class action provision as unconscionable on the grounds that it discourages individuals with small claims from enforcing their rights and causes "litigants to contract away the court's ability to use a

procedural mechanism [the class action] that benefits the court system as a whole." 118 Cal. Rptr. 2d at 868.

The *Szetela* court's reasoning cannot be reconciled with this Court's declarations that "the FAA is 'at bottom a policy *guaranteeing* the enforcement of private contractual arrangements'" and that "we look first to whether the parties *agreed* to arbitrate a dispute, *not to general policy goals*, to determine the scope of the agreement . . . ." *EEOC v. Waffle House, Inc.* 122 S. Ct. 754, 764 (2002) (emphasis added). By flouting the FAA's "guarantee," the *Szetela* court's opinion generates substantial confusion and disrupts the settled expectations of *amici* that arbitration agreements will be enforced strictly in accordance with their terms. The opinion will both discourage companies from arbitrating, while encouraging hostility to arbitration of the type that the FAA was enacted to overcome.[2]

ARGUMENT

I. THE *SZETELA* OPINION UNDERMINES THE FAA'S GUARANTEE THAT ARBITRATION AGREEMENTS WILL BE ENFORCED STRICTLY IN ACCORDANCE WITH THEIR TERMS.

Arbitration under the FAA is a matter of consent, not coercion. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). The FAA's "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 478 (1989). *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("the preeminent concern of Congress

---

[2] *See, e.g., Luna v. Household Fin. Corp.*, No. C02-1635L, 2002 U.S. Dist. LEXIS 21761 (W.D. Wash. Nov. 4, 2002); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2001); *ACORN v Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (all denying motions to compel arbitration and all citing *Szetela*).

in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate"). This Court further instructed in *Waffle House*:

> "[I]t is the language of the contract that defines the scope of disputes subject to arbitration . . . . *[N]othing in the statute [the FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.*" 122 S.Ct. at 762 (emphasis added).

A. Under the FAA, Arbitration Agreements that Contain No-Class Action Provisions Must Be Enforced as Written and Are Not Unconscionable.

A party considering arbitration is making a decision whether the benefits of arbitration outweigh its limitations. Arbitration is a "less expensive alternative to litigation," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995), in part because of its very informality. "[A]rbitration saves time, saves trouble, saves money." Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924).[3] Converting an agreement to arbitrate individual disputes into a *class* arbitration, however, radically alters this calculus. For a court "to read such a term into the parties' agreement disrupt[s] the negotiated risk/benefit allocation and direct[s] the parties to proceed with a different sort of arbitration." *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotations and brackets omitted).

---

[3] As Congress found in 1982, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep No. 97-542, at 3 (1982); *see also Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1307, 1313 (2001).

Accordingly, and consistent with the fundamental principle that nothing in the FAA "authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement," *Waffle House*, *supra*, the vast majority of federal and state courts that have considered the issue have held that under the FAA, an express agreement to not permit class-wide arbitration must be strictly enforced in accordance with its terms. Even if the clause is merely silent on the issue, class-wide arbitration cannot be ordered.[4]

---

[4] *See, e.g.*, *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001) (where "the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals"); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) ("it appears impossible [to pursue class arbitration] unless the arbitration agreement contemplates such a procedure"); *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 817-818 (11th Cir. 2001) (a "contractual provision to arbitrate TILA [Truth in Lending Act] claims is enforceable even if it precludes a plaintiff from utilizing class action procedures"); *Deiulemar Compagnia de Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999) (where the parties' agreement did not provide for class arbitration, "the FAA has already provided the type of procedure to be followed in this case, namely, nonclass arbitration"); *Champ v. Siegel Trading Co., Inc.*, *supra*, 55 F.3d at 271 ("absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration"); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509 (7th Cir. 1999) ("[b]ecause arbitration is based fundamentally on an agreement between the parties, [a Rule 23 class action] is normally unavailable in arbitration"); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001) (compelling arbitration of plaintiff's TILA claims even though she was precluded from representing a class); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002) (court cannot order arbitration to proceed on class-wide basis unless arbitration agreement expressly authorizes it); *Gray v. Conseco, Inc.*, 2001 U.S. Dist. LEXIS 21696 (C.D. Cal. Sept. 6, 2001) (even where arbitration clause is merely silent on the issue, court cannot order class-wide arbitration); *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994), *appeal*

Moreover, recognizing that a class action is a mere procedure that can be waived, the federal and state courts overwhelmingly hold that a no-class action provision in an arbitration agreement is not unconscionable under the FAA.[5]

---

dismissed, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998) (same); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994) (same); *Gras v. Associates First Cap. Corp.*, 2001 WL 1632292 (N.J. Super. Ct. App. Div. Dec. 20, 2001) (enforcing "no class action" provision in arbitration agreement); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001) (FAA preempts state law favoring class); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270 (Wash. Ct. App. 2001) (refusing to compel class arbitration where parties' agreement was silent); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998) ("to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration").

[5] *See, e.g.*, *Lloyd v. MBNA America Bank, N.A.*, No. 01-1752, slip op. at 3 (3d Cir. Jan. 7, 2002) (because right to a class action is "merely procedural" and may be waived, "an arbitration clause barring classwide relief for claims brought under the TILA is not unconscionable"); *Snowden* v. *Checkpoint Check Cashing, Inc.*, 290 F.3d 631, 638-639 (4th Cir. 2002) (finding no-class action provision to be not unconscionable), *cert. denied*, 2002 U.S. LEXIS 9264 (Dec. 16, 2002); *Pick v. Discover Fin. Servs., Inc.*, No. 00-935-SLR, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions"); *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001) (no-class action provision is not unconscionable and must be enforced); *Thompson v. Illinois Title Loans, Inc.*, No. 99 C 3952, 2000 WL 45493, at *4 (N.D. Ill. Jan. 11, 2000) ("[t]he class action is a procedural device that ... claimants may waive by agreeing to arbitrate their claims"); *Zawikowski v. Beneficial Nat'l Bank*, No. 98 C 2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) (court rejected argument that inclusion in a consumer loan agreement of a clause prohibiting class actions was void as a matter of public policy, holding that "[n]othing prevents the Plaintiffs from contracting away their right to a class action"); *Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048, 1065 (N.D. Ga. 1986), *aff'd in part and rev'd in part on different grounds*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (class action rule is a mere "procedural device" that is subject to preemption by the FAA);

Amici have relied on this legion of well-reasoned authorities in deciding to utilize consumer arbitration agreements which call for individual, rather than class, resolution of disputes. Until *Szetela*, they have been confident that such agreements would be enforced according to their terms, ensuring that the attributes of arbitration—speed, efficiency and economy—would be realized.

Caudle v. American Arbitration Ass'n, 230 F.3d 920 (7th Cir. 2000) ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants"); *Lomax v. Woodmen of the World Life Ins. Soc.*, No. CIV.A.1:01-CV-2134WBH, 2002 WL 31455600, *3 (N.D. Ga. July 16, 2002) ("[g]enerally, prohibiting class-wide arbitration does not render an otherwise valid arbitration clause unconscionable"); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002) (FAA forbids federal court from ordering class arbitration where parties' arbitration agreement is silent on matter); *Vigil v. Sears Nat. Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002) (rejecting argument that arbitration clause was unconscionable because it prohibited class actions); *Lewis Tree Service, Inc. v. Lucent Technologies, Inc.*, No. 99 Civ. 8556, 2002 WL 31619029 (S.D.N.Y. Nov. 20, 2002) ("[f]ederal courts have ... consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue"); *Mattox v. Decision One Mortgage Co.*, No. Civ. A. 0-10657, 2002 WL 31121087 (D. Mass. Sept. 26, 2002) (arbitration clause enforceable even in absence of class action); *McIntyre v. Household Bank*, 216 F. Supp. 2d 719, 724 (N.D. Ill. Aug. 19, 2002) (right to class action may be "waived in order to enforce arbitration"); *Shales v. Discover Card Services, Inc.*, No. 02-0080, 2002 WL 2022590, at *2 (E.D. La. Aug. 30, 2002) ("Shales raised the issue of the validity of the class action restriction contained in the agreement. Although he cites to a California state court decision that struck such a restriction under California law [*Szetela*], the court notes that such restrictions are routinely enforced in this jurisdiction.").

B. The Principle that No-Class Action Provisions Are Enforceable in Accordance with Their Terms Is Substantive Federal Arbitration Law that Preempts Inconsistent State Procedures.

Although class actions are procedural in nature,[6] the principle that no-class action clauses are enforceable in accordance with their terms is substantive federal arbitration law that preempts inconsistent state procedures. In *Champ v. Siegel Trading Co., supra*, the Seventh Circuit held that where the parties' arbitration clause does not expressly authorize class actions in arbitration, the "*FAA [itself]* has already provided the type of procedure to be followed . . ., namely, non-class-action arbitration." 55 F.3d at 276 (emphasis added). *See also Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 860 (4th Cir. 2000) ("Federal law governs the construction of contract language concerning arbitrability . . . . 'Once a dispute is covered by the [FAA], federal law applies to all questions of interpretation [and] construction . . .'") (citations omitted). The FAA creates "federal substantive law" that is "applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). Therefore, the *Szetela* court lacked authority to strike the no-class action provision from the arbitration agreement simply because it preferred the class action procedure over individual arbitration.

C. The Szetela Opinion Impermissibly Forces Companies to Choose between Class Arbitration or No Arbitration at All.

By striking the no-class action provision, the *Szetela* court jettisoned the risk/benefit analysis that the parties engaged in prior to agreeing to arbitrate in the first instance. This

---

[6] *See, e.g.*, Fed. R. Civ. P. 23.

intrusion into the private contracting process is of great concern to *amici*, many of whose members have implemented or are planning to implement arbitration programs in reliance upon the heretofore settled premise that arbitration agreements governed by the FAA will be enforced as written. If courts are permitted to materially alter private arbitration agreements governed by the FAA in order to effectuate state procedures, parties will be greatly discouraged from arbitrating their disputes, since there will be no predictability or assurance that the parties' contractual terms will be respected, notwithstanding the FAA's "guarantee" that such terms must be enforced as written.

Indeed, striking a no-class action provision imposes a Hobson's Choice—face the prospect of class-wide arbitration[7] or abandon arbitration altogether. The effect of refusing to enforce a no-class action provision is to sweep complex extra-contractual issues (class action criteria), strangers to the contract (hundreds, thousands or even millions of absent putative class members) and constitutional considerations (due process protections) into what was supposed to be a fast and economical individual arbitration.

---

[7] In some states, such as California and South Carolina, a clause that is silent on the issue of class-wide arbitration is susceptible to an argument that class-wide arbitration should be permitted. *See, e.g., Keating v. Superior Court*, 31 Cal. 3d 584 (1982), *rev'd in part on other grounds*, 465 U.S. 1 (1984); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Bazzle, et al. v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *pet. for cert. filed* (Oct. 23, 2002). *Amici* strongly endorse Petitioner's argument that review should be granted to resolve the growing conflict between these and certain other state court decisions which impose class action procedures on arbitration agreements that are either silent as to such procedures or that expressly preclude them, and federal court decisions which uniformly hold that courts may not impose class arbitration unless the parties' arbitration agreement expressly provides for that procedure and that arbitration agreements containing express no-class action provisions are enforceable. *See* Pet. for Cert. at 13-20.

This is the exact *opposite* of the fundamental principle that "nothing in the statute [the FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *Waffle House, supra.*

Even the few courts that compel forced class arbitration concede that "[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating v. Superior Court, supra*, 31 Cal. 3d at 613; *see also Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) ("[c]lass-wide arbitration is a different animal than individual arbitration"). In particular, class-wide arbitration has to draw upon the array of procedural mechanisms and inquiries that Fed. R. Civ. P. 23 (or its state law equivalent) specifies in order to satisfy constitutional due process standards. The management of large class actions is a time-consuming, costly and complex process, even when managed by experienced trial judges, much less by arbitrators who typically lack the case-management skills and experience that trial judges develop from handling class actions. In sharp contrast, arbitration under the FAA is a procedure that is supposed to avoid the delay, cost and complexity of even single-party litigation in the federal or state courts.

Faced with the prospect of participating in a class-wide arbitration that is radically different from the procedure agreed to, and is not really arbitration at all, most companies would almost surely decide to abandon arbitration altogether (which is what Discover did in this case). *See Champ v. Siegel Trading Co., Inc., supra*, 55 F.3d at 275 ("'to substitute our own notion of fairness in place of the explicit terms of [the parties' arbitration] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate'") (citations omitted). Thus, refusing to enforce a no-class action provision agreed

to by the—parties is tantamount to a refusal to compel arbitration altogether—a result that nullifies the federal policies embodied in the FAA and turns the statute on its head.

II. THE *SZETELA* OPINION IMPROPERLY RELEGATES INDIVIDUAL ARBITRATION TO SECOND-CLASS STATUS

Amici are also deeply troubled by the *Szetela* court's bias *against* arbitration as a method of dispute resolution. The court characterized the no-class action provision as a "get out of jail free" card for Discover that created "virtual immunity" for the company. 118 Cal. Rptr. 2d at 867. It also concluded that individual arbitration is of "no benefit whatsoever" to consumers with small claims. *Id.* at 868. Arbitration was also denied because the *Szetela* court perceived it to be less "efficient" than class actions brought in court. *Id.* Such anti-arbitration animus, in this day and age, is as shocking as it is legally incorrect. Review is necessary to restore the confidence of the business community in arbitration as an *equal*—not less favored—means of dispute resolution.

"[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270. In passing the FAA, Congress sought to place "arbitration agreements upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). This Court has also made it clear that by agreeing to arbitrate, "a party does not forgo . . . substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *accord*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action

in the arbitral forum,' the statute serves its functions"). Although these principles were fully applicable in the present case,[8] they were completely ignored by the *Szetela* court.

The *Szetela* court also refused to enforce the parties' arbitration agreement, as written, because it concluded that individual arbitration is a less "efficient" method of resolving disputes than class actions in court. The court stated:

> "[T]he clause violates public policy . . . . One of the policy reasons for class actions is to promote judicial economy and streamline the litigation process in appropriate cases. To allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine, seek directed verdicts, or use other

---

[8] In the present case, it was undisputed that all of Szetela's *substantive* claims against Discover would be preserved in arbitration. Discover's arbitration agreement expressly provides that the arbitrator "shall follow applicable substantive law . . . ." Moreover, class actions are hardly the only mechanism for enforcing Szetela's rights. For example: (a) under the Discover arbitration agreement, individuals with small claims can arbitrate or they can pursue their claims in small claims court; (b) the Delaware Consumer Fraud Act, under which Szetela asserted claims against Discover, establishes a comprehensive scheme of enforcement by the Delaware Attorney General. *See* 5 Del. Code §§2514 *et seq.*; (c) pursuant to 5 Del. Code §143, the Delaware State Bank Commissioner is empowered to require Delaware banks to take affirmative action to correct violations of Delaware banking statutes and regulations and to impose civil penalties if the violations are not corrected; and (d) the FDIC is authorized to seek remedies (including cease and desist orders, restitution, suspension or removal of affiliated parties from office and civil monetary penalties) for any violations of state or federal law by state banks such as Discover. 12 U.S.C. §1818 (b)-(i). *See Johnson v. West Suburban Bank, supra* (the availability of administrative enforcement of TILA by the FDIC and other agencies supported enforcement of the bank's arbitration clause, even though class actions were not available in arbitration).

> procedural devices that allow the courts to operate in an efficient manner." 118 Cal. Rptr. 2d at 868.

This is a stinging indictment of arbitration and an encomium on the benefits of court litigation. But it is 77 years too late. Following the passage of the FAA in 1925, the *only* public policy that is relevant once parties have entered into an arbitration agreement governed by the FAA is the *federal* public policy making the arbitration agreement enforceable in accordance with its terms. The *Szetela* opinion is a throwback to the days when arbitration agreements were not enforced for the very reason that they were "arbitration agreements" which removed the parties from the judicial system. But the days when it was permissible to discriminate against arbitration in favor of court litigation are long over, as this Court recounted in *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*:

> "Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration . . . . Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" 500 U.S. at 30 (citation omitted).

Accord, *Green Tree Fin. Corp.-Ala. v. Randolph*, *supra*, 531 U.S. at 89-90. Significantly, in *Gilmer*, one of plaintiff's objections to arbitration was that class actions were not available. This Court dismissed that objection, holding that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator . . . that . . . does not mean that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32 (citation omitted).

Moreover, the *Szetela* court had it backwards. While the *Szetela* court concluded that arbitration must yield to court procedures that promote efficiency, this Court has made it abundantly clear that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). *Accord*, *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 (1985) (courts are required to enforce the bargain of the parties to arbitrate even where the result would be the possibly inefficient maintenance of separate proceedings in different forums).

Amici firmly believe, and this Court has often observed, that arbitration is a process that benefits individuals.[9] As indicated in *Gilmer*, this is so even if the arbitration proceeds on an individual, rather than a class action, basis. Review is warranted so that arbitration regains its rightful place—not below litigation, but on the "same footing." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

---

[9] *Circuit City Stores, Inc. v. Adams*, *supra* (compelling arbitration in dispute between employee and employer); *Green Tree Financial Corp.-Ala. v. Randolph*, *supra* (compelling arbitration of named plaintiff's claims in dispute between lender and borrower who had brought putative class action); *Allied-Bruce Terminix*, *supra* (compelling arbitration in dispute between homeowner and service company and observing that arbitration is "helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation"). Indeed, "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN J. GILL
General Counsel
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

ALAN S. KAPLINSKY *
MARK J. LEVIN
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Counsel for *Amici Curiae*

* Counsel of Record